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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1736

GEORGE J. DARNEILLE *et al.*,

Petitioners,

v.

MICHAEL CARO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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May 2, 1980

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IN THE

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Petitioners,

v.

MICHAEL CARO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Preliminary Statement

Petitioners George J. Darneille, F. Arnold Daum, Alex W. Head, Beaumont Development Corporation and Webster Securities Limited respectfully pray that a writ of certiorari issue to review an order of the Court of Appeals which reversed and remanded the District Court's order denying Respondent's motion to intervene in an action which had previously been dismissed as moot and from which no appeal was then pending because the original plaintiff had abandoned his appeal. Petitioners, together with John P. Ohl and I. L. Vosko, were the defendants in the District Court and petitioners were the appellees in the Court of Appeals. Respondent Michael Caro was the putative intervenor in the District Court and the appellant in the Court of Appeals.

Opinions and Orders Below

The order of the Court of Appeals (App.A, *infra,* pp. 1a to 5a) is unreported. It was rendered on January 9, 1980 and a timely petition for rehearing was denied on February 27, 1980 (App.B., *infra,* pp. 6-7a). Of the several prior orders of the Court of Appeals and the opinions and orders of the District Court which are reprinted in appendices C through M, *infra,* only four of the decisions of the District Court have been published. These are reported at 79 F.R.D. 389, *appeal dismissed,* 595 F.2d 1210; 78 F.R.D. 671; 78 F.R.D. 669; and [1977-78 Transfer Binder] CCH Fed.Sec.L.Rep. ¶ 96,278.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

For jurisdictional purposes, does a complaint seeking money damages (for a violation of the securities laws), when coupled with a class action request, survive the abandonment of the entire action by the only named plaintiff during the pendency of his appeal from the District Court's denial of class action certification, so as to support intervention in the District Court by a new plaintiff who seeks not to pursue the appeal from the denial of class certification but to litigate his own claim on the merits?

Constitutional and Statutory Provisions Involved

Constitutional and statutory provisions involved include the following:

United States Constitution, Article III,

Federal Rules of Civil Procedure, Rule 23, and

United States Code, Title 15, Section 78j(b) (Securities Exchange Act of 1934, Section 10(b)).

Statement of the Case

Original Plaintiff Weisman brought this action both "on behalf of himself and all others similarly situated", purporting to state a claim under the Securities Exchange Act of 1934 ("1934 Act"). After the District Court sustained the sufficiency of part of his complaint (37a; 48a),* Mr. Weisman sought and the District Court denied class certification (32a). The denial was based on Mr. Weisman's gross unfitness to serve as an adequate class representative (34a) and the District Court expressly declined to reach any of his other arguments, *viz.*, numerosity, commonality, typicality, favorability, manageability, superiority, desirability, predominance or any of the other requisites of a class action under Rule 23, Fed.R.Civ.P. (*id.*).

After the District Court, making it clear that Mr. Weisman was pursuing his claim on his own behalf alone, denied Mr. Weisman's several subsequent requests for various kinds of inappropriate relief (25a), the defendants—although unwilling to concede any wrongdoing or liability—decided it was not economical to commit significant resources to the defense of a claim which the complaint revealed to be $221.40. Accordingly, they tendered to Mr. Weisman a bank check in the sum of his own individual claim plus court costs. Mr. Weisman never returned or refused this payment.

On motion of the defendants, the District Court dismissed Mr. Weisman's individual complaint (which it had declined to certify as a class action) as moot on July 14, 1978 (19a), and Mr. Weisman appealed to the Court of

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* While we do not agree with the District Court's conclusion that the complaint states any claim upon which relief can be granted, that question was not before the Court of Appeals and thus is not before this Court.

Appeals for the Second Circuit. The appeal was fully briefed and argued on December 8, 1978. On January 15, 1979—prior to any decision by the Court of Appeals—Mr. Weisman *requested that the appeal be dismissed;* he wrote a letter which his attorneys delivered to the Court of Appeals stating "that, due to personal reasons, *I wish to withdraw as plaintiff* in the [instant] lawsuit" (emphasis added). On January 17, 1979, the Court of Appeals dismissed the appeal by an Order which read in pertinent part:

> "[I]t is now hereby ordered . . . that, because the appellant, who has been found by the District Court to be an inadequate class representative, has indicated that *he no longer wishes to be a plaintiff in this lawsuit,* the appeal be dismissed. This order shall not prejudice the right of another plaintiff to enter the suit within 30 days" (15a) (emphasis added).*

On February 2, 1979, Putative Intervenor Caro filed a motion to intervene in the District Court—*not for purposes of pursuing the appeal of the denial of class certification* but to litigate his own claim—and on March 16, 1979, the District Court denied intervention in an order which, in its entirety, read as follows:

> "The motion of Michael Caro to intervene in this action as a party plaintiff is denied without prejudice to his right to commence a new action based on the acts alleged in this action. Our dismissal of Weisman's action has not been appealed, and there is, therefore, no action pending in which Caro can intervene. *Tilley Lamp Co.* v. *Thacker,* 454 F.2d 805 (5th Cir. 1972). Additionally, Caro does not seek to intervene to appeal the denial of Weisman's motion for class certification, and, thus, the Supreme Court's deci-

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* Defendants sought modification of this order and on March 7, 1979, the Court of Appeals denied their motion (16a).

sion in *United Airlines, Inc.* v. *McDonald,* 432 U.S. 385 (1977), is not applicable.

"So ordered." (9a).

Mr. Caro's petition for a writ of mandamus compelling the District Court to allow intervention was denied by the Court of Appeals on June 8, 1979, but his appeal (which had been dismissed on May 14, 1979 for failure to perfect properly, 12a) was reinstated (10a). On January 9, 1980, the Court of Appeals issued the order sought to be reviewed (1a).

The order of the Court of Appeals reversed and remanded the District Court's order denying intervention into an action previously dismissed for mootness and never certified as a class action by the District Court where the only original named plaintiff not only no longer had a claim against any defendant, but had *voluntarily withdrawn* from any further participation in the case after the District Court had denied certification and, in fact, had *abandoned his appeal* wherein he sought to challenge the denial of class certification. Nowhere in its four page order did the Court of Appeals address the constitutional requirement of case or controversy, which the District Court had held was not satisfied at the time the Intervenor sought to intervene to assert his own claim (*and not to appeal the denial of class certification*); instead, the Court of Appeals invoked its "broad powers to make such disposition of the case before it as justice requires" (4a).* A timely petition for rehearing was denied on February 27, 1980 (6a).

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* Invoking Rule 42, Fed.R.App.P. (4a), the Court of Appeals said that it was "empowered to impose terms *upon the parties seeking to avoid that adjudication* [of mootness and the correctness of the denial of class certification]" (5a) (emphasis added). Of course, it was *Mr. Weisman* who sought to avoid that (or any other) adjudication by withdrawing from his appeal, but *the defendants* upon whom the Court of Appeals in effect "imposed terms".

REASONS FOR GRANTING THE WRIT

The Decision Below Conflicts With Prior Supreme Court Authority by Sanctioning "Client-Less Litigation" * and Disregards the Constitutional Requirement of a Live Controversy Throughout the Entirety of the Litigation Because Mr. Weisman, Who Abandoned His Action (Unlike the Plaintiffs in *Roper* and *Geraghty*), No Longer Had a Personal Stake in the Outcome of the Litigation and Mr. Caro (Unlike the Intervenor in *United Airlines*) Did Not Seek to Intervene to Appeal the Denial of Class Certification, Thus Leaving *No One* Before the Court With Any Claimed Interest Adverse to Any Defendant

The Decision Below Is Not Governed by *Roper* and *Geraghty* or by *United Airlines*

In two decisions earlier this Term the Court confronted the question of the mootness, *vel non,* of a non-certified class action wherein the individual plaintiff who no longer has a claim himself seeks to prosecute an appeal from the denial of class action certification and determined that such a plaintiff has a sufficient "personal stake" in the outcome of class certification to satisfy the requirements of Article III of the Constitution. *Deposit Guaranty National Bank* v. *Roper,* 445 U.S. ——, 100 S.Ct. 1166 (1980); *United States Parole Commission* v. *Geraghty,* 445 U.S. ——, 100 S.Ct. 1202 (1980).** Crucial to this Court's deci-

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* *Deposit Guaranty National Bank* v. *Roper,* 445 U.S. ——, 100 S.Ct. 1116, 1181 n. 13 (1980) (Mr. Justice Powell, dissenting).

** In both *Roper* and *Geraghty* it was ultimately determined by the Courts of Appeals that the District Court's denial of class certification was erroneous and that such error "related back" to the original denial and thus preserved jurisdiction. No such determi-

sions was the ongoing "personal stake in the outcome" of the named plaintiffs in these cases (*Geraghty*, 100 S.Ct. at 1212: "Respondent here continues vigorously to advocate his right to have a class certified"; *Roper*, 100 S.Ct. at 1173: "Respondents have maintained throughout this appellate litigation that they retain a continuing individual interest in the resolution of the class certification question").*

Here, however, Original Plaintiff Weisman abandoned his appeal from the denial of class certification and expressed his desire *"to withdraw as plaintiff"* in the action. The Court of Appeals recognized his withdrawal and dismissed the appeal (14a), but allowed 30 days for "another plaintiff to enter the suit" (15a). Query, *what* suit? Mr. Weisman's substantive claim had been extinguished by the tender, and he *abandoned* his personal stake in the outcome of the class certification question in the midst of the pendency of that very appeal.

Perhaps the Court of Appeals contemplated intervention by another plaintiff to prosecute the appeal from the denial of class certification, as its citation of *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977), might suggest (17a).

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nation was ever made here and, we submit, it is most unlikely that an appellate court would conclude that the District Court abused its discretion by refusing to certify a convicted securities fraud felon as a class representative in a 10b-5 action under the 1934 Act, pretermitting his various other character deficiencies (32-36a; *see* 27-29a). *See Geraghty, supra*, 100 S.Ct. at 1212 ("If, on appeal, it is determined that class certification properly was denied, the claim on the merits must be dismissed as moot").

* In *Roper* this Court expressly limited its consideration to only "the private interest of the named plaintiffs" (100 S.Ct. at 1170) which, after the tender of damages, continued only "so long as they retained an economic interest in class certification" (*id.* at 1171). *Contrast* Mr. Weisman's total abandonment of his "private interests" here.

Roper and *Geraghty* would support such a result. But that is not what happened here. Putative Intervenor Caro (represented by Weisman's counsel) chose to intervene in the District Court to prosecute the action on the merits, and not in the Court of Appeals to prosecute the appeal from the denial of class certification. The District Court correctly perceived the difference between the two (9a) as later noted by this Court in *Geraghty*, 100 S.Ct. at 1207, and *Roper*, 100 S.Ct. at 1169 & 1171 n.5. Finding *"no action pending* in which Caro can intervene" (9a), the District Court necessarily dismissed.

What the Court of Appeals reversal did was to direct the District Court to "consider the application . . . of Caro [to intervene]" (5a) without explaining what it was that Caro might intervene into. What it was *not* is clear: it was not any action in which Mr. Weisman had a "personal stake" in either the substantive merits or the procedural outcome of class certification; Mr. Weisman had abandoned the action in all respects.

As this Court said in *Roper, supra*, 100 S.Ct. at 1170:

> "[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims. *Should these substantive claims become moot in the Art. III sense,* by settlement of all personal claims for example, *the court retains no jurisdiction over the controversy of the individual plaintiffs*" (emphasis added).

That is precisely what happened here: the substantive (and all other) claims became moot in the Art. III sense *by their abandonment by Mr. Weisman*, and the court retained no jurisdiction over *anything.** All that was left

* In *Roper*, although this Court was willing to assume that the District Court's final judgment of mootness precluded appeal on

was "the definitive mootness of a case or controversy, which ousts the jurisdiction of the federal courts and requires dismissal of the case" (*Roper, supra,* 100 S.Ct. at 1172).

This case—unlike *Roper* or *Geraghty*—is the very "lawsuit that has no plaintiff" which the Chief Justice and Justices Powell, Stewart and Rehnquist, dissenting in *Geraghty* (100 S.Ct. at 1218), feared. Mr. Weisman was no longer the client—he had withdrawn. Mr. Caro was not yet the client, for he had not yet entered the suit. Who, then, was the client *at the time intervention was sought, viz., after* Mr. Weisman withdrew and *before* the advent of Mr. Caro? The answer is inescapable: no one! The Second Circuit's unwillingness to recognize this extreme case of mootness as demonstrating the absence of "self-interested parties vigorously advocating opposing positions" (*Geraghty,* 100 S.Ct. at 1212) is tantamount to abandoning entirely Article III's requirement of a case or controversy in favor of litigation by "concerned bystanders" (Mr. Justice Powell, joined by the Chief Justice and Justices Stewart and Rehnquist dissenting in *Geraghty,* 100 S.Ct. at 1217) at best or self-interested lawyers seeking fees at worst.

Roper and *Geraghty* simply stand for the proposition that *Mr. Weisman* could have pursued his appeal from the

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that aspect, it noted that "it does not follow that this circumstance would terminate *the named plaintiffs' right* to take an appeal on the issue of class certification" (100 S.Ct. at 1171) (emphasis added), *"so long as that party retains a stake in the appeal* satisfying the requirements of Art. III" (*id.*) (emphasis added). In *Roper,* the named plaintiffs retained such a stake because of their stated "desire to shift part of the costs of litigation to those who will share in its benefits if the class is certified and ultimately prevails" (*id.* at 1173 & 1171 n. 6). Here, Mr. Weisman never articulated such a desire and, on the contrary, abandoned his appeal.

denial of class certification. Of course, he elected to do otherwise. *United Airlines* simply stands for the proposition that *Mr. Caro* could have pursued Mr. Weisman's abandoned appeal from the denial of class certification. Of course, he too elected to do otherwise. Thus, as neither *Roper* nor *Geraghty* nor *United Airlines* applies, it must be the other relevant decisions of this Court which control. These decisions were simply ignored by the Court of Appeals, which thus entered an order in irreconcilable conflict with such decisions of this Court and with Article III of the Constitution.

The Decision Below Conflicts With Prior Decisions of This Court

It was well settled prior to the order below that federal courts may only entertain actions presenting a live case or controversy, U.S. Const., Art. III, § 2; *e.g., DeFunis* v. *Odegaard,* 416 U.S. 312, 317 (1974); *Sibron* v. *New York,* 392 U.S. 40, 50 n.8 (1968), and appellate courts are likewise constrained. *E.g., Sosna* v. *Iowa,* 419 U.S. 393, 402 (1975); *SEC* v. *Medical Committee for Human Rights,* 404 U.S. 403 (1972).* In the absence of such a case or con-

* It was equally well settled prior to the order below that where a case has become moot while in the District Court, no such live controversy exists and, accordingly, appellate jurisdiction is lacking, *Steffel* v. *Thompson,* 415 U.S. 452, 459 n.10 (1974) ("an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed"). That was precisely the situation here.

Here, Mr. Weisman's substantive claim became moot in the District Court long before Mr. Caro sought to intervene. Mr. Weisman's controversy with the various defendants arose out of his belief that they ought to pay him a sum of money which was at most $221.40 and the defendants, although maintaining they were not obligated to do so, paid Mr. Weisman this sum of money. Accordingly, there was no live controversy between Mr. Weisman and any defendant over his substantive claim as of a date well prior to Mr. Caro's motion to intervene. Similarly, there was no live controversy between Mr. Weisman and any defendant over

troversy, subject matter jurisdiction is lacking and dismissal of the action is mandated, regardless of its procedural posture at the time. Fed.R.Civ.P. 12(h)(3). *A fortiori,* where subject matter jurisdiction is lacking, intervention is precluded because there is no action (over which the Court has jurisdiction) to intervene into.

The Court of Appeals' reference to "the intended class" (3a) was inappropriate, for "the case was 'stripped of its character as a class action' upon denial of certification by the District Court", *United Airlines, Inc.* v. *McDonald,* 432 U.S. 385, 393 (1977), *citing* Advisory Committee's Note on 1966 Amendments to Rule 23.* Conversely, because the class was never certified, it never acquired a legal status separate from that of then-plaintiff Weisman. *See Sosna* v. *Iowa, supra,* 419 U.S. 393, 399 (1975). Thus, the class contemplated in Mr. Weisman's original complaint never achieved jurisprudential existence and, therefore, could not succeed to Mr. Weisman's adversary position upon Mr. Weisman's withdrawal. *See, e.g., Kremens* v. *Bartley,* 431 U.S. 119, 132-33 (1977) ("it is only a 'properly certified' class that may succeed to the adversary position of a named representative whose claim becomes moot"); *East Texas Motor Freight System, Inc.* v. *Rodriguez,* 431 U.S. 395, 406 n.12 (1977) ("Obviously, a different case would be pre-

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his procedural claim to be entitled to prosecute his action as a class action as of the date of his withdrawal as plaintiff during the pendency of his own appeal. Ignoring the obvious import of this total lack of a live controversy, the Court of Appeals simply referred to "the intended class" (3a) and "the class which Weisman purported to represent" (4a). This formulation, however, wholly ignores the fact that there can be no "class" and no "class members" unless and until a District Court certifies that *all the requirements* of Rule 23 have been met. Here, there was no such certification and, in fact, *none of the requirements* of Rule 23 had been met.

* Since Rule 23 is a rule of procedure only, it cannot serve to enlarge the jurisdiction of federal courts. *See United States* v. *Sherwood,* 312 U.S. 584, 589-90 (1941).

sented if the District Court had certified a class and only later had it appeared that the named plaintiffs were not class members or were otherwise inappropriate class representatives. In such a case, the class claims would have already been tried, and, provided the initial certification was proper and decertification not appropriate, the claims of the class members would not need to be mooted or destroyed because subsequent events or the proof at trial had undermined the named plaintiffs' individual claims"); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976); *see, e.g., Board of School Commissioners* v. *Jacobs*, 420 U.S. 128 (1975) (this Court instructed the lower court to dismiss the complaint as moot because no class action determination had been adequately made and the named plaintiffs no longer had any interest in the matter in controversy); *Weinstein* v. *Bradford*, 423 U.S. 147 (1975) (this Court vacated the judgment below and directed the lower court to dismiss the complaint because the case had become moot as to the named plaintiff and class certification had been denied); *Baxter* v. *Palmigiano*, 425 U.S. 308, 311 n.1 (1976) ("[w]ithout such certification and identification of the class, the action is not properly a class action"). In *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976), this Court again emphasized that absent a formal certification of a class, the case becomes moot when the named plaintiff no longer has a personal stake in the case, and this is so despite the fact that the parties informally treated it as a class action and the potential class members continued to have an interest in the outcome.*

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* It is the *fact* of mootness and not the *cause* of it that counts on the jurisdictional issue. The mootness may arise by act of the parties or otherwise. In *United States* v. *Alaska S.S. Co.*, 253 U.S. 113, 116 (1920), this Court said:

"Where by an act of the parties, or a subsequent law, the existing controversy has come to an end, the case becomes moot and should be treated accordingly."

(Footnote continued on next page)

Accord, Deposit Guaranty National Bank v. *Roper, supra,* 100 S.Ct. at 1171.

Although all of the foregoing decisions of this Court have a direct bearing on the question of just what it was that Mr. Caro sought to intervene into, *none* of them was even cited by the Court of Appeals.

To summarize, this Court is committed to these principles: (1) a continuing live controversy is essential as a jurisdictional base; (2) the live controversy must be one between parties having a legal status before the Court; (3) the mere filing of a complaint seeking class certification does not confer legal party status on the class or on its members; (4) without proper certification by the trial court, the "class" does not attain legal status unless the case falls into the very narrow exception (not relevant here) where the asserted wrong to the plaintiff is "capable of repetition, yet evading review", and (5) a named plaintiff in a purported class action retains a sufficient stake in the outcome to pursue an appeal from the denial of class certification even when his own individual claim has become moot.

Here, the order below violated *each* of these principles of this Court's decisions by sanctioning the possibility of intervention into a dead litigation wherein—at the time intervention was sought—*no plaintiff* existed and thus no case or controversy was presented.

(Footnote continued from preceding page)
In *California* v. *San Pablo & T.R.R.*, 149 U.S. 308 (1893), this Court held that an action was mooted by tender of all sums which could be recovered, despite the refusal of the plaintiff to accept the tender. *Accord, Deposit Guaranty National Bank* v. *Roper, supra,* 100 S.Ct. at 1171.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that a writ of certiorari should issue to review the order of the Court of Appeals.

Dated: New York, New York
May 2, 1980

Respectfully submitted,

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APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

79-7408

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of January, one thousand nine hundred and eighty.

PRESENT:

HON. ELLSWORTH A. VAN GRAAFEILAND,
HON. AMALYA L. KEARSE,

Circuit Judges.

HON. JOHN F. DOOLING, JR.,*

U.S. District Judge.

MICHAEL CARO,

Intervenor-Appellant,

v.

GEORGE J. DARNEILLE, F. ARNOLD DAUM, ALEX W. HEAD, BEAUMONT DEVELOPMENT CORPORATION and WEBSTER SECURITIES LIMITED,

Defendants-Appellees,

and

JOHN P. OHL and I. L. VOSKO,

Defendants.

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* Hon. John F. Dooling, Jr., U.S. District Court, Eastern District of New York, sitting by designation.

Appendix A

Order

On May 2, 1977, Samuel Weisman brought an action against the above named defendants on behalf of all shareholders of Westates Petroleum Corporation as of February 1, 1977. The complaint alleged violations of sections 10(b) and 13(d) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b) and 78m(d), Commission Rule 10b-5, 17 C.F.R. § 240.10b-5, and Commission Regulation 13D, 17 C.F.R. § 240.13d-1 *et seq.* In essence, the complaint alleged a scheme by the defendants to purchase the common stock of Westates while they were in possession of inside information that Westates would be liquidated at a much higher price per share than they were paying. On defendants' motion, the district court dismissed the section 13(d) claim but held that the section 10(b) claim stated a cause of action.

On April 19, 1978, the district court denied Weisman's motion for class certification on the ground that Weisman could not thoroughly and adequately protect the interest of the class. *See Weisman* v. *Darneille*, 78 F.R.D. 669, 670 (S.D.N.Y. 1978). Although the district court refused thereafter to certify the class certification question for interlocutory appeal, plaintiff, on May 16, 1978, filed a notice of appeal to this Court from the district court's April 19 order. On May 18, 1978, two days after the notice of appeal was filed, defendants moved in district court to dismiss the action as moot on the ground that they had tendered Weisman a check for $271.40, the amount of his claimed individual damages plus $50 court costs. By opinion dated July 14, 1978, the district court held that the action was moot, and judgment of dismissal was entered on July 27, 1978. On August 17, 1978, Weisman appealed from that judgment.

Appendix A

The appeal was heard by this Court on December 8, 1978. Appellant's arguments were addressed to both the denial of class certification and the dismissal of the complaint. Before a decision was handed down, appellant Weisman advised the Court that for reasons of health he wished to withdraw as plaintiff in the litigation.

On January 17, 1979, this Court entered an order dismissing the appeal without prejudice to the right of another plaintiff to enter the suit within thirty days.

On February 2, 1979, Michael Caro, another member of the intended class, moved to intervene pursuant to the leave granted in this Court's January 17, 1979 order. Several defendants then moved in this Court for a modification of the January 17 order to provide that the order was without prejudice to the right of another plaintiff to file suit based upon the facts alleged in the amended complaint. By order dated March 7, 1979, this Court denied defendants' motion stating:

> "Because class certification has been denied, 'it does not . . . follow that the case must be treated as if there never was an action brought on behalf of absent class members.' " (Citations omitted).

Despite this Court's reiteration of its position in the March 7, 1979 order, the district court, on March 14, 1979, denied Caro's motion to intervene by memorandum endorsement which read as follows:

> "The motion of Michael Caro to intervene in this action as a party plaintiff is denied without prejudice to his right to commence a new action based on the acts alleged in this action. Our dismissal of Weisman's action has not been appealed, and there is, therefore, no action pending in which Caro can intervene. *Tilley*

Lamp Co. v. *Thacker,* 454 F.2d 805 (5th Cir. 1972). Additionally, Caro does not seek to intervene to appeal the denial of Weisman's motion for class certification, and, thus, the Supreme Court's decision in *United Air Lines, Inc.* v. *McDonald,* 432 U.S. 385 (1977), is not applicable."

Because the district court has failed to comply with the mandate of this Court, we reverse.

In exercising its appellate jurisdiction, this Court has broad powers to make such disposition of the case before it as justice requires. *In re Barnett,* 124 F.2d 1005, 1009 (2d Cir. 1942). It may, pursuant to Rule 42 of the Federal Rules of Appellate Procedure, fix terms or conditions for voluntary dismissal by an appellant. This rule is similar to Rule 41(a)(2) of the Federal Rules of Civil Procedure, and many of the same considerations should apply. *See In re Barnett, supra,* 124 F.2d at 1013. Included among those considerations should be the nature of the action as one brought on behalf of an intended class, particularly where, as here, statute of limitations problems are involved. *See United Airlines, Inc.* v. *McDonald,* 432 U.S. 385, 392 (1977); *Shelton* v. *Pargo, Inc.,* 582 F.2d 1298, 1304-16 (4th Cir. 1978); *Rothman* v. *Gould,* 52 F.R.D. 494 (S.D.N.Y. 1971); *Philadelphia Electric Co.* v. *Anaconda American Brass Co.,* 43 F.R.D. 452, 460-61 (E.D. Pa. 1968). Where class certification is denied because of inadequacy of representation, courts should not be unmindful of the interests of absent members of the intended class, who may have relied upon the ongoing litigation. *See Smith* v. *Josten's American Yearbook Co.,* 78 F.R.D. 154, 175 (D. Kan. 1978).

It was this Court's concern for the class which Weisman purported to represent that prompted us to condition the

dismissal of the appeal with the proviso that the dismissal would be without prejudice to the right of another plaintiff to enter the suit within thirty days. At the time the order of dismissal was entered, the issue of mootness was before this Court on appeal together with the order denying class certification, upon which the claim of mootness was based, and adjudication of those issues was pending. This Court was empowered to impose terms upon the parties seeking to avoid that adjudication.

The order appealed from is reversed and the matter is remanded to the district court with instructions to consider the application of appellant Caro in accordance with the provisions of Rule 24 of the Federal Rules of Civil Procedure. Because appellees have now raised an issue as to the adequacy of appellant's motion papers on his application for intervention, appellant may have leave to file an amended and more detailed set of papers in support of his application.

ORDER dated this 9th day of January, 1980.

/s/ ELLSWORTH A. VAN GRAAFEILAND

/s/ AMALYA L. KEARSE

Circuit Judges.

/s/ JOHN F. DOOLING, JR.

District Judge.

Appendix B

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

79-7408

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-seventh day of February, one thousand nine hundred and eighty.

Present:

HON. ELLSWORTH A. VAN GRAAFEILAND,
HON. AMALYA L. KEARSE,

Circuit Judges,

HON. JOHN F. DOOLING, JR.,

District Judge.

SAMUEL WEISMAN, on behalf of himself and all others similarly situated,

Plaintiff,

MICHAEL CARO,

Appellant,

v.

GEORGE J. DARNEILLE, F. ARNOLD DAUM, JOHN P. OHL, I. L. VOSKO, BEAUMONT DEVELOPMENT CORP., and WEBSTER SECURITIES LIMITED,

Defendants-Appellees.

Appendix B

A petition for a rehearing having been filed herein by counsel for the appellees George J. Darneille and F. Arnold Daum

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

/s/ A. DANIEL FUSARO
A. Daniel Fusaro, Clerk

Appendix B

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

79-7408

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-seventh day of February, one thousand nine hundred and eighty.

SAMUEL WEISMAN, on behalf of himself and all others similarly situated,

Plaintiff,

MICHAEL CARO,

Appellant,

v.

GEORGE J. DARNEILLE, F. ARNOLD DAUM, JOHN P. OHL, I. L. VOSKO, BEAUMONT DEVELOPMENT CORP., and WEBSTER SECURITIES LIMITED,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellees George J. Darneille and F. Arnold Daum, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ IRVING R. KAUFMAN
Irving R. Kaufman, Chief Judge

Appendix C

Weisman v. *Darneille*

ENDORSEMENT

77 Civ 2110 (LFM)

The motion of Michael Caro to intervene in this action as a party plaintiff is denied wthout prejudice to his right to commence a new action based on the acts alleged in this action. Our dismissal of Weisman's action has not been appealed, and there is, therefore, no action pending in which Caro can intervene. *Tilley Lamp Co.* v. *Thacker,* 454 F.2d 805 (5th Cir. 1972). Additionally, Caro does not seek to intervene to appeal the denial of Weisman's motion for class certification, and, thus, the Supreme Court's decision in *United Air Lines, Inc.* v. *McDonald,* 432 U.S. 385 (1977), is not applicable.

So ordered.

Dated: New York, N. Y.
March 14, 1979

/s/ Lloyd F. MacMahon
Lloyd F. MacMahon
United States District Judge

Appendix D

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

79-8258

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of June, one thousand nine hundred and seventy-nine.

SAMUEL WEISMAN, on behalf of himself and all others similarly situated,

Plaintiff,

MICHAEL CARO,

Appellant,

v.

GEORGE J. DARNEILLE, F. ARNOLD DAUM, JOHN P. OHL, I. L. VOSKO, BEAUMONT DEVELOPMENT CORP., and WEBSTER SECURITIES LIMITED,

Defendants-Appellees.

It is hereby ordered that the motion made herein by counsel for the appellant by notice of motion dated May 23, 1979 to reinstate the appeal herein be and it hereby is granted.

Appendix D

It is further ordered that the petition for mandamus is denied.

/s/ Irving R. Kaufman
Irving R. Kaufman, Chief Judge.

/s/ J. Joseph Smith (Per IRK)
J. Joseph Smith

/s/ Ellsworth Van Graafeiland
(Per IRK)
Ellsworth Van Graafeiland
Circuit Judges.

Appendix E

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Temporary Docket No. 79-8258

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 14th day of May, one thousand nine hundred and seventy-nin[e].

SAMUEL WEISMAN, on behalf of himself and all others similarly situated,

Plaintiff,

MICHAEL CARO,

Appellant,

v.

GEORGE J. DARNEILLE, F. ARNOLD DAUM, JOHN P. OHL, I. L. VOSKO, BEAUMONT DEVELOPMENT CORPORATION and WEBSTER SECURITIES LIMITED,

Defendants-Appellees.

The Civil Appeals Management Plan of this court having been promulgated on April 9, 1974 providing that within ten (10) days after filing a notice of appeal the appellant shall docket an appeal, by filing and serving a pre-argument statement (Form C), by ordering from the court reporter a transcript of the proceedings and filing and

serving a statement concerning same (Form D) and by paying the docket fee and that in default of either of which the Clerk may dismiss the appeal without further notice,

And the appeal herein not having been so docketed,

Upon consideration thereof, it is

Ordered that the appeal from the judgment dated: 3-16-79 of the United States District Court for the Southern (77C2110) District of New York be and it hereby is dismissed.

A. Daniel Fusaro
Clerk

/s/ Sara Piovia
By: Sara Piovia
Deputy Clerk

Appendix F

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

78-7422

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the seventeenth day of January, one thousand nine hundred and seventy-nine.

Present:

HONORABLE IRVING R. KAUFMAN,
Chief Judge.
HONORABLE J. JOSEPH SMITH,
HONORABLE ELLSWORTH VAN GRAAFEILAND,
Circuit Judges.

SAMUEL WEISMAN,

Plaintiff-Appellant,

v.

GEORGE J. DARNEILLE, F. ARNOLD DAUM, ALEX W. HEAD, BEAUMONT DEVELOPMENT CORPORATION and WEBSTER SECURITIES LIMITED,

Defendants-Appellees,

and

JOHN P. OHL and I.L. VOSKO,

Defendants.

Appendix F

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that, because the appellant, who has been found by the District Court to be an inadequate class representative, has indicated that he no longer wishes to be a plaintiff in this lawsuit, the appeal be dismissed. This order shall not prejudice the right of another plaintiff to enter the suit within 30 days.

/s/ IRVING R. KAUFMAN
Irving R. Kaufman, Chief Judge.

/s/ J. JOSEPH SMITH (Per IRK)
J. Joseph Smith

/s/ ELLSWORTH VAN GRAAFEILAND
Ellsworth Van Graafeiland,
Circuit Judges.

Appendix G

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

78-7422

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 7th day of March, one thousand nine hundred and seventy-nine.

SAMUEL WEISMAN, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

v.

GEORGE J. DARNEILLE, F. ARNOLD DAUM, ALEX W. HEAD, JOHN P. OHL, I.L. VOSKO, BEAUMONT DEVELOPMENT CORPORATION, a Delaware Corporation, and WEBSTER SECURITIES LIMITED, a Bahamas Corporation,

Defendants-Appellees.

It is hereby ordered that the motion made herein by counsel for the Darneille and Daum appellees by notice of motion dated February 15, 1979 to modify the Court's decision of January 16, 1979 be and it hereby is denied. Because class certification has been denied, "it does not . . . follow that the case must be treated as if there never was an action brought on behalf of absent class members.' "

Appendix G

United Airlines, Inc. v. *McDonald,* 432 U.S. 385, 393 (1977), *quoting Philadelphia Electric Co.* v. *Anaconda American Brass Co.,* 43 F.R.D. 452, 461 (E.D. Pa. 1968).

/s/ Irving R. Kaufman
Irving R. Kaufman, Chief Judge.

/s/ J. Joseph Smith
J. Joseph Smith

/s/ Ellsworth Van Graafeiland
(Per IRK)
Ellsworth Van Graafeiland
Circuit Judges

Appendix H

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 2110 (LFM)

SAMUEL WEISMAN, on behalf of himself and all others similarly situated,

Plaintiff,

—against—

GEORGE J. DARNEILLE, F. ARNOLD DAUM, ALEX W. HEAD, JOHN P. OHL, I. L. VOSKO, BEAUMONT DEVELOPMENT CORPORATION, a Delaware Corporation, and WEBSTER SECURITIES LIMITED, a Bahamas Corporation,

Defendants.

JUDGMENT

This action came on for hearing before the Court, Honorable Lloyd F. MacMahon, District Judge, presiding, and the motion to dismiss as moot having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged

that the plaintiff take nothing and that the action be dismissed as moot.

Dated: New York, New York
July 25, 1978

/s/ LLOYD F. MACMAHON
U.S.D.J.

JUDGMENT ENTERED 7/27/78

/s/ RAYMOND F. BURGHARDT
Clerk

Appendix I

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 2110 (LFM)

SAMUEL WEISMAN, on behalf of himself and all others similarly situated,

Plaintiff,

—against—

GEORGE J. DARNEILLE, F. ARNOLD DAUM, ALEX W. HEAD, JOHN P. OHL, I. L. VOSKO, BEAUMONT DEVELOPMENT CORPORATION and WEBSTER SECURITIES LIMITED,

Defendants.

OPINION

APPEARANCES:

Kaufman Taylor Kimmel & Miller
By: Stanley L. Kaufman and
Irving Malchman, Esqs.
41 East 42 Street
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—and—

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Attorneys for Plaintiff

Appendix I

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By: Gerald E. Bodell, Esq.
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Beaumont Development Corporation.

Patterson, Belknap, Webb & Tyler
By: Thomas C. Morrison, Esq.
30 Rockefeller Plaza
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Attorneys for defendant
Webster Securities Limited.

MacMahon, *District Judge.*

Defendants move to dismiss the complaint for lack of jurisdiction over the subject matter. Rule 12(b)(1), Fed. R.Civ.P. Plaintiff moves for an order compelling production of documents. Rules 34 and 37, Fed.R.Civ.P.

This is an action for securities fraud which was brought as a class action, seeking damages for alleged violations of Section 10(b) of the Securities Exchange Act of 1934

and Rule 10b-5 thereunder.[1] On April 19, 1978, we denied plaintiff's motion to certify the action as a class action, holding, *inter alia,* that plaintiff's status as a convicted felon, and his reticence in disclosing this fact to his counsel and his adversaries, demonstrated a lack of "honesty, conscientiousness, and other affirmative personal qualities required of a class representative." *Weisman* v. *Darneille,* 77 Civ. 2110 (S.D.N.Y. Apr. 19, 1978), opinion at 4. Thereafter, we refused to certify the class certification question for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). See *Weisman* v. *Darneille,* 77 Civ. 2110 (S.D.N.Y. May 25, 1978). Undaunted, plaintiff, nevertheless, filed a notice of appeal from our order refusing to certify the class, basing appellate jurisdiction upon 28 U.S.C. § 1291.

Subsequently, defendants tendered to plaintiff the full amount of plaintiff's individual damages sought in the complaint. The instant motion to dismiss the complaint followed, defendants contending that the action has been mooted and that we, consequently, lack jurisdiction over the subject matter.

Before turning to the merits of defendants' motion, we must examine our jurisdiction. Plaintiff contends that his filing of a notice of appeal from our order denying class certification deprives us of jurisdiction to decide the instant motion.

Generally, the taking of an appeal does indeed deprive the district court of jurisdiction to take any further action in the case, except in aid of the appeal or to correct clerical

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[1] Claims alleging violations of Section 13 of the Securities Exchange Act of 1934 and of Regulation 13D, 17 C.F.R. §§ 240.13d-1—240.13d-4, were dismissed in a memorandum and order on March 22, 1978. See *Weisman* v. *Darneille,* 77 Civ. 2110 (S.D.N.Y. Mar. 22, 1978).

errors. See, *e.g.*, *East Hampton Dewitt Corp.* v. *State Farm Mut. Auto. Ins. Co.*, 490 F.2d 1234, 1246 (2d Cir. 1974); *Segal* v. *Gordon*, 467 F.2d 602, 608 n.12 (2d Cir. 1972). This rule, however, presupposes the existence of a valid appeal from an appealable order. *Lowenschuss* v. *Kane*, 392 F. Supp. 59, 60 (S.D.N.Y. 1974). Where a notice of appeal refers to an order which is clearly non-appealable, the mere taking of the appeal is insufficient to divest the district court of jurisdiction. In such circumstance, the district court may ignore the notice of appeal and may proceed with the case. See, *e.g.*, *Arthur Andersen & Co.* v. *Finesilver*, 546 F.2d 338, 340-41 (10th Cir. 1976), *cert. denied sub nom. Arthur Andersen & Co.* v. *Ohio*, 429 U.S. 1096 (1977).

In the absence of certification under § 1292(b), our order refusing to certify this action as a class action is clearly unappealable. See *Coopers & Lybrand* v. *Livesay*, 46 U.S. L.W. 4757 (U.S. June 21, 1978). Thus, plaintiff's purported appeal in this case does not divest us of jurisdiction to adjudicate the instant motion to dismiss the complaint.[2]

Turning to the merits of the motion, we can only conclude that the instant case has been mooted. Defendants have chosen not to contest plaintiff's claims and have tendered the full measure of plaintiff's damages. Plaintiff's claim is, therefore, satisfied, and he no longer has a stake in the resolution of the issues raised in the complaint. Thus, no live controversy exists between the parties, and the case is moot. A moot case presents no "case or controversy" cognizable under Article III of the Constitution,

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[2] Subsequent to the drafting of this opinion, we were informed by counsel for plantiff that, in light of *Livesay*, plaintiff intended to consent to defendants' motion to dismiss the appeal. Such consent by plaintiff in no way alters our decision here, since, at the moment, the appeal remains pending in the Court of Appeals.

and we, therefore, lack jurisdiction over the subject matter.[3] See *Winokur* v. *Bell Fed. Sav. & Loan Ass'n*, 560 F.2d 271, 276-77 (7th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3586 (U.S. Mar. 21, 1978). See also *Lasky* v. *Quinlan*, 558 F.2d 1133, 1136-37 (2d Cir. 1977); *Vun Cannon* v. *Breed*, 565 F.2d 1096, 1099 (9th Cir. 1977).

There is no merit to plaintiff's argument that a dismissal here would undermine the policies behind Rule 23, Fed.R. Civ.P. To be sure, our decision may well obviate review of our refusal to certify the class. See *Winokur* v. *Bell Fed. Sav. & Loan Ass'n, supra*, 560 F.2d at 276-77, *on rehearing*, 562 F.2d 1034, 1034 & n.* (7th Cir. 1977) (Swygert, J., dissenting from denial of petition for rehearing *en banc*). Nevertheless, a dismissal for mootness does no real damage to the members of the putative class. Any putative class member may now institute an action, on his own behalf or on behalf of a class, seeking recovery for the same transactions and occurrences sued upon here. The availability of such an action is certainly sufficient to protect the interests of the absent putative class members, and we find nothing in Rule 23 which demands more than this.

Accordingly, defendants' motion to dismiss the complaint is granted. In view of this disposition, plaintiff's motion

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[3] We do not understand plaintiff to argue that he cannot be "forced" to accept "involuntarily" the tender of damages. However, to the extent plaintiff challenges the propriety and the efficacy of such practice, his challenge is without merit. Whether or not plaintiff "accepts" a tender of damages, the case becomes moot upon tender. At that point, full-blown litigation would yield no recovery greater than that voluntarily offered by defendants, and a live controversy no longer exists between the parties. The authorities cited by plaintiff are not to the contrary. See *Williams* v. *Sinclair*, 529 F.2d 1383 (9th Cir.), *cert. denied*, 426 U.S. 936 (1976); *Cameron* v. *E.M. Adams & Co.*, 547 F.2d 473 (9th Cir. 1976).

for an order compelling production of documents is denied as moot.

Settle judgment within ten (10) days.

Dated: New York, N. Y.
July 14, 1978

/s/ LLOYD F. MACMAHON
Lloyd F. MacMahon
United States District Judge

Appendix J

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 2110 (LFM)

SAMUEL WEISMAN, on behalf of himself and all others similarly situated,

Plaintiff,

—against—

GEORGE J. DARNEILLE, F. ARNOLD DAUM, ALEX W. HEAD, JOHN P. OHL, I.L. VOSKO, BEAUMONT DEVELOPMENT CORPORATION and WEBSTER SECURITIES LIMITED,

Defendants.

APPEARANCES:

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—and—

Kaufman Taylor Kimmel & Miller
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OPINION

MACMAHON, *District Judge.*

Plaintiff moves for (1) the appointment of a guardian ad litem for the putative class, or (2) certification pursuant to 28 U.S.C. § 1292(b) of our opinion and order dated April 19, 1978. He also moves, in a separate motion, for (1) a list of the "class" members and (2) an order compelling the production of certain documents.

Plaintiff brought this direct action under Section 10(b) of the Securities Exchange Act of 1934[1] and Rule 10b-5[2] to recover the allegedly illegal profits defendants gained

[1] 15 U.S.C. § 78j(b).

[2] 17 C.F.R. § 240.10b-5.

from the liquidation of Westates Petroleum Company.[3] In our opinion and order dated April 19, 1978, we denied plaintiff's motion for class certification on the sole ground that he did not meet the requirements of Rule 23(a)(4), Fed.R.Civ.P. We found that plaintiff was not an adequate class representative because he had a prior felony conviction under Section 10(b), his conduct in this action did not comport with the high standards of honesty and integrity required of a fiduciary, and his knowledge of, and participation in, this litigation was not that required of a proper representative. See *Weisman* v. *Darneille,* No. 77 Civ. 2110 (S.D.N.Y. Apr. 19, 1978) (denial of motion for class certification).

Guardian Ad Litem

Plaintiff's motion for the appointment of a guardian ad litem is grounded on the premise that the guardian could "oversee plaintiff's conduct as a class representative and . . . insure that plaintiff does in fact adhere to the highest standards of honesty and integrity in this case." He further argues that defendants will escape liability for their alleged wrongdoing unless a guardian is appointed. The arguments are frivolous.

Plaintiff has cited no authority, and our research has disclosed none, supporting the proposition that a guardian may be appointed to protect the interests of a *putative* class. In every instance in which a guardian has been appointed, the interests of a *certified class* were incon-

[3] Plaintiff also sought recovery under Section 13 of the Securities Exchange Act of 1934, 15 U.S.C. § 78m, and under Regulation 13D thereunder, 17 C.F.R. §§ 240.13d-1—240.13d-4. We dismissed those claims pursuant to Rule 12(b)(6), Fed.R.Civ.P., on March 22, 1978, however.

sistent with those of its representative or his counsel. Our prior denial of certification here is thus a critical distinction between this case and those cited by plaintiff. In the absence of certification, there is no "class" whose interests need to be protected by a guardian ad litem.

Plaintiff's argument that denial of this motion will allow defendants to escape liability for their allegedly illegal acts is also unpersuasive. Rejection of one plaintiff as an adequate class representative does not preclude our granting class certification to another representative plaintiff.[4]

Rule 23(a)(4), moreover, requires that the class representative himself be an adequate fiduciary for the class. That requirement cannot be satisfied by a patently inadequate representative supervised by an individual with no stake in the litigation. What plaintiff attempts in this motion is an end-run around Rule 23. We refuse to permit that circumvention of the rule's principles and deny the motion insofar as it seeks the appointment of a guardian ad litem for the putative class.

§ 1292(b) Certification

Certification of an interlocutory order to the Court of Appeals cannot be granted unless the "district judge . . . shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."[5] Plaintiff has not specified the question of law which he considers control-

[4] See *Brick* v. *CPC International, Inc.*, 547 F.2d 185 (2d Cir. 1976).

[5] 28 U.S.C. § 1292(b).

ling. His memoranda, however, attack both of the grounds on which our order of April 19 rested: that plaintiff had not demonstrated the personal integrity required in the fiduciary role he sought and that his knowledge of, and participation in, this litigation were insufficient to satisfy Rule 23(a)(4).

Neither of those grounds, however, can serve as the basis for the certification of our order. Both involve mixed questions of law and fact and therefore cannot give the Court of Appeals jurisdiction to hear an interlocutory appeal.[6]

Moreover, there is not "substantial ground for difference of opinion" regarding either of those grounds. Plaintiff has cited no authority directly supporting his contention that a felon can be a proper class representative when he has been convicted under the very statute invoked in the purported class action.[7] Nor has he cited any decisions by our Court of Appeals or by courts in the Southern District of New York rejecting our second ground for denying certification. Indeed, that ground is supported by substantial precedent in this district.[8] We therefore deny plaintiff's motion insofar as it seeks § 1292(b) certification of our April 19 order.

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[6] See *Link* v. *Mercedes-Benz of North America, Inc.*, 550 F.2d 860 (3d Cir.), *cert. denied*, 431 U.S. 933 (1977); *Johnson* v. *Allredge*, 488 F.2d 820 (3d Cir. 1973), *cert. denied*, 419 U.S. 882 (1974).

[7] Plaintiff's argument that the courts allow prisoners to maintain class actions on behalf of other prisoners is specious. No one but a prisoner could be a proper class representative in such a case.

[8] See *Weisman* v. *Darneille*, *supra*, and cases there cited; *Greenspan* v. *Brassler*, 77 Civ. 1573 (S.D.N.Y. Feb. 14, 1978), and cases there cited.

Appendix J

Class List

Plaintiff also seeks a list of the "class members" in this action so that he can "alert the class to its rights and to the fact that these rights are in serious jeopardy."

The simple and dispositive answer to this request, however, is that class certification has been denied in this action. There are therefore no class members and no class rights to be protected.[9] Plaintiff's attempt to communicate with non-parties to induce them to intervene here, moreover, poses serious ethical problems for his counsel. We therefore deny this motion insofar as it seeks a class list.

Document Production

Plaintiff finally seeks an order compelling defendants and others to produce documents sought in prior discovery requests.[10]

Rule 9(f), General Rules for United States District Courts for the Southern and Eastern Districts of New York, requires, however, that every motion for an order compelling production must be accompanied by the mov-

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[9] Plaintiff's authorities cited in support of this aspect of his motion are inapposite. In *Lowenschuss* v. *Bluhdorn,* 73 Civ. 2021 (S.D.N.Y. Apr. 20, 1978), Judge Bonsal ordered that the disqualified class representative in a *certified class action* be given a class list to seek substitute representation. N.Y. Business Corporation Law § 624(b) (McKinney 1963) deals with the rights of certain shareholders to inspect the books of a corporation and to seek in the *state* courts an order allowing such inspection. Section 627 of that law and *Weisfeld* v. *Spartan Industries, Inc.,* 58 F.R.D. 570, 578-79 (S.D.N.Y. 1972), allow a plaintiff in a *derivative* action to inspect the corporation's shareholder list to find other shareholders willing to intervene and thereby obviate the necessity of his posting security for his state law claims.

[10] Rule 37(a), Fed.R.Civ.P.

ant's affidavit that he has conferred with opposing counsel in an attempt to resolve the dispute informally. Plaintiff has not submitted such an affidavit, and this failure appears especially significant here, in light of defendants' representations that they are ready to comply with any proper discovery request. We therefore deny plaintiff's request for a production order without prejudice to renewal upon his compliance with General Rule 9(f).

One final matter must be resolved. On January 6, 1978, we stayed all discovery in this action pending the determination of the class certification motion. There may have been some confusion among the parties as to whether plaintiff's motion for § 1292(b) certification extended that stay. To eliminate that confusion, we hold that the stay is vacated as of this date.

Accordingly, our prior stay of discovery in this action is vacated as of this date. Plaintiff's motion for an order compelling production of documents is denied without prejudice to renewal after compliance with General Rule 9(f). Plaintiff's motions are otherwise denied in all respects.

So ordered.

Dated: New York, N. Y.
May 25, 1978

/s/ LLOYD F. MACMAHON
Lloyd F. MacMahon
United States District Judge

Appendix K

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 2110 (LFM)

SAMUEL WEISMAN, on behalf of himself and all others similarly situated,

Plaintiff,

—against—

GEORGE J. DARNEILLE, F. ARNOLD DAUM, ALEX W. HEAD, JOHN P. OHL, I. L. VOSKO, BEAUMONT DEVELOPMENT CORPORATION and WEBSTER SECURITIES LIMITED,

Defendants.

OPINION

APPEARANCES:

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—and—

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Attorneys for defendant Webster Securities Limited

MacMahon, *District Judge.*

Plaintiff moves, pursuant to Rule 23(c), Fed.R.Civ.P., for class certification in this action.

The complaint alleges that certain officers and directors of Westates Petroleum Company (Westates) and other individuals used their inside knowledge and made false S.E.C. filings to profit illegally from Westates' liquidation. Plaintiff, a Westates shareholder, brought this direct action under Section 10(b)[1] of the Securities Exchange Act of 1934 and Rule 10b-5[2] to recover the wrongful profits.[3] He

[1] 15 U.S.C. § 778j(b).

[2] 17 C.F.R. § 240.10b-5.

[3] The complaint also alleged violations of Section 13, 15 U.S.C. § 78m, and of Regulation 13D, 17 C.F.R. §§ 240.13d-1—240.13d-4. In a memorandum and order dated March 22, 1978, however, we dismissed those claims under Rule 12(b)(6), Fed.R.Civ.P., with leave to replead. Plaintiff has informed us by letter dated March 29, 1978 that he will not file an amended complaint.

now seeks to represent "all persons, exclusive of defendants, who owned shares of Westates . . . on February 1, 1977, the record date for determining the shareholders of Westates who are entitled to share in the proceeds of the liquidation of Westates."

Certification is dependent on plaintiff's proof that each of the requirements of Rule 23(a), Fed.R.Civ.P., has been met. *Fruchthandler* v. *Blakely*, 73 F.R.D. 318 (S.D.N.Y. 1976). We conclude that plaintiff cannot "fairly and adequately protect the interests of the class," Rule 23(a)(4), Fed.R.Civ.P., and therefore do not consider his other arguments.

Plaintiff is a felon convicted of violating Section 10(b), the very statute he invokes here. On November 27, 1974, a Southern District of New York jury found him guilty of stock fraud (in violation of 15 U.S.C. §§ 78j(b) and 78f(f)), mail fraud (in violation of 18 U.S.C. §§ 2 and 1341), and conspiracy (in violation of 18 U.S.C. § 371), in connection with the sale of stock in Automated Information Systems, Inc. (Automated). He subsequently was fined $5,000 by Hon. Charles M. Metzner, who departed from his "normal practice in such cases [of imposing] a sentence of incarceration" only because plaintiff was aged and in poor health. Plaintiff, an attorney, was also censured by the Appellate Division as a result of his felony conviction. Under current standards, however, he would have been disbarred automatically. *In re Chu*, 42 N.Y.2d 490, 369 N.E.2d 1, 398 N.Y.S.2d 1001 (1977).

Plaintiff, moreover, did not reveal the fact of his conviction to counsel here until the day before his deposition. During the deposition, he expressed an inability to understand a question concerning his experience as a litigant and then testified falsely that his conviction was for a mis-

demeanor. His testimony regarding an unrelated S.E.C. inquiry and other litigation was similarly evasive.

Plaintiff's conviction and subsequent conduct here convince us that he lacks the " 'honesty, conscientiousness, and other affirmative personal qualities' " required of a class representative. *Ash* v. *Brunswick Corp.*, 1974-75 Fed. Sec. L. Rep. (CCH) ¶ 95,109 at 97,950-51 (D. Del. 1975), quoting 7 C. Wright & A. Miller, *Federal Practice and Procedure* § 1766. As a fiduciary for the class, he would be required to adhere to the highest standards of honesty and integrity. See *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 549-550 (1949). He clearly failed to meet those standards in the Automated transaction and has similarly failed to do so in this suit. That conduct is sufficient to dictate the denial of class certification here. *Amswiss Int'l Corp.* v. *Heublein, Inc.*, 69 F.R.D. 663 (N.D. Ga. 1975); *Ash* v. *Brunswick Corp., supra.*[4]

Plaintiff's unfamiliarity with this suit also requires the denial of certification. *Greenspan* v. *Brassler*, No. 77 Civ. 1573 (LFM) (S.D.N.Y. Feb. 14, 1978). Plaintiff did not meet with his counsel in the ten months between the filing of the complaint and the day preceding his deposition. He cannot describe his claim or name the defendants. He was not even certain that he had seen a copy of the complaint before his deposition. Apart from his awareness that he must bear the costs of the suit, plaintiff knows none of the duties and responsibilities of a class representative. Indeed, he has done little more in this action than write an

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[4] Plaintiff's conviction and deposition testimony also may subject him to discrediting cross-examination at trial that could prejudice the claims of the class. Cf. *Koos* v. *First Nat'l Bank*, 496 F.2d 1162 (7th Cir. 1974) (certification should be denied when the putative representative is subject to an unique defense).

initial letter to his counsel, sign a retainer and submit to a deposition.

Plaintiff's superfluous role here does not meet the requirements of Rule 23(a)(4). The class is entitled under that rule to more than competent counsel. It must also be assured that it will have an adequate representative, one who will check the otherwise unfettered discretion of counsel in prosecuting the suit and who will provide his personal knowledge of the facts underlying the complaint. *Greenspan* v. *Brassler, supra.* The class is entitled to a representative who is more than "a key to the courthouse door dispensable once entry has been effected." *Saylor* v. *Lindsley,* 456 F.2d 896, 900 (2d Cir. 1972). Plaintiff's evident willingness to rely on counsel's ability to protect the interests of the class is inconsistent with the participation required of an adequate class representative. *Greenspan* v. *Brassler, supra,* and cases cited at pp. 8-9. See also *Citron* v. *Marine Midland Banks, Inc.,* No. 77 Civ. 2557 (CMM) (S.D.N.Y. Mar. 27, 1978).

Accordingly, plaintiff's motion for class certification is denied.

So ordered.

Dated: New York, N. Y.
April 19, 1978

/s/ Lloyd F. MacMahon
Lloyd F. MacMahon
United States District Judge

Appendix L

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 2110 (LFM)

SAMUEL WEISMAN, on behalf of himself and all others similarly situated,

Plaintiff,

—against—

GEORGE J. DARNEILLE, F. ARNOLD DAUM, ALEX W. HEAD, JOHN P. OHL, I. L. VOSKO, BEAUMONT DEVELOPMENT CORPORATION and WEBSTER SECURITIES LIMITED,

Defendants.

MEMORANDUM

MACMAHON, *District Judge.*

Defendants move for 28 U.S.C. § 1292(b) certification of our order dated January 6, 1978, or, alternatively, for reargument under Local Rule 9(m) of their motion to dismiss the complaint.

Plaintiff brought this direct action on behalf of himself and all other shareholders (excluding defendants) of Westates Petroleum Company ("Westates") at the time of its liquidation. The complaint seeks damages for alleged violations of Sections 10(b)[1] and 13[2] of the Securi-

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[1] 15 U.S.C. § 78j(b), which states:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

[2] 15 U.S.C. § 78m, which states:

"(d)(1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 78*l* of this title . . . is directly or indirectly the beneficial owner of more than 5 per centum of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors—

(A) the background and identity of all persons by whom or on whose behalf the purchases have been or are to be effected;

(B) the source and amount of the funds or other consideration used or to be used in making the purchases . . . ;

(C) if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons; or to make any other major change in its business or corporate structure;

(D) the number of shares of such security which are beneficially owned, and the number of shares concerning which there is a right to acquire, directly or indirectly, by (i) such person, and (ii) by each associate of such person, giving the name and address of each such associate; and

(E) information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer . . . naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof."

ties Exchange Act of 1934 and of Rule 10b-5[3] and Regulation 13D[4] promulgated thereunder.

Our January 6 opinion and order denied defendants' motion to dismiss the complaint under Rule 12(b)(6), Fed.R.Civ.P. That motion attacked the complaint's allegations of damages, causation and scienter, as well as

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[3] 17 C.F.R. § 240.10b-5, which states:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any fact, practice, or course of business which operates or would operate as a fraud or deceipt upon any person,

in connection with the purchase or sale of any security."

[4] 17 C.F.R. §§ 240.13d-1—240.13d-4, the relevant portion of which states:

"Any person who, after acquiring directly or indirectly the beneficial ownership of any security of a class which is registered pursuant to section 12 of the Act, . . . is directly or indirectly the beneficial owner of more than 5 per-centum of such class shall, within 10 days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement containing the information required by Schedule 13D (§ 240.13d-101). Eight copies of the statement shall be filed with the Commission. Where an acquisition, not heretofore subject to this rule, was made subsequent to December 22, 1970, but prior to January 18, 1971, the specified statement shall be sent to the issuer and any exchange and filed with the Commission not later than January 28, 1971.

* * * At the time of filing the statement, the person making the filing shall pay to the Commission a fee of $100, no part of which shall be refunded."

plaintiff's standing to bring the action. We construed the complaint favorably to plaintiff[5] and accepted as true[6] the following allegations:

Samuel Weisman owned 100 shares of Westates from sometime prior to August 9, 1974 continuously to the company's liquidation. Defendants (certain officers and directors of Westates and other individuals) had learned that Westates' stock was substantially undervalued in the open market and that it would bring a higher price upon the company's liquidation. They also had learned, through the use of inside and non-public information, that Westates might seek liquidation.

Pursuant to a conspiracy to influence the company to sell its assets and dissolve, defendants purchased approximately 293,900 Westates shares[7] in the open market at an average price of $3.24 per share from August 9, 1974 through January 1, 1975. The Schedules 13D filed by defendants pursuant to Regulation 13D were false or misleading in that they failed to disclose defendants' inside knowledge, their conspiracy and their intent to benefit from Westates' dissolution. Seven weeks after defendants' purchases had been made, Westates publicly invited offers to purchase its assets. A sale of substantially all of the company's assets, with the approval of the stockholders, was consummated on January 21, 1977. As a concomitant of the sale, Westates will redeem all of its stock for approximately $10.70 to $11.10 per share. Defendants will thus net a wrongful profit of $2,251,735.00 as a result of

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[5] *Scheur* v. *Rhodes,* 416 U.S. 232 (1974).

[6] *Cruz* v. *Beto,* 405 U.S. 319, 322 (1972).

[7] These purchases gave defendants ownership of approximately 6% of Westates' stock.

the differential between the market and redemption values of their August 9, 1974 through January 1, 1975 stock purchases.

Motions for Reargument

In their original motion to dismiss, defendants argued that plaintiff lacked standing to bring this action because he had not purchased or sold stock in connection with their alleged fraud.[8] We held, however, that plaintiff might be able to prove that the Westates redemption constituted a "forced sale" of his stock under *Vine* v. *Beneficial Finance Co.*, 374 F.2d 627 (2d Cir.), *cert. denied*, 389 U.S. 970 (1967), and *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787 (2d Cir. 1969), *cert. denied*, 400 U.S. 822 (1970), and therefore refused to dismiss his Section 10(b) and Rule 10b-5 claims.[9] We grant defendants' motion for reargument of that portion of our order, and, upon reargument, adhere to our prior decision.

Our January 6 order also denied defendants' motion to dismiss plaintiff's Section 13 and Regulation 13D claims under Rule 12(b)(6). We held that plaintiff's status as a forced seller might enable him to maintain those claims under Section 18 of the Securities Exchange Act of 1934.[10]

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[8] See *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975) (plaintiff must purchase or sell stock in connection with the alleged fraud to have standing under Section 10(b) or Rule 10b-5).

[9] See *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957).

[10] 15 U.S.C. § 78r, which states:

"(a) Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any

It appears now that we were misled on this point. While defendants superficially briefed plaintiff's standing under Section 18, they failed completely to mention that section's pleading requirements. As a result, we did not consider those requirements and must now waste time considering issues that should have been raised and resolved weeks ago. We grant the motion for reargument of this portion of our order, and, upon reargument, reverse our order of January 6, 1978 to the extent that we grant defendants' motion to dismiss plaintiff's Section 13 and Regulation 13D claims.

Section 13(d) requires any person[11] acquiring more than a 5% beneficial ownership of a securities class to file with the SEC a statement disclosing certain background information. Section 13(d) does not imply or expressly grant a right to bring a private damage action for its violation.[12]

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material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading. A person seeking to enforce such liability may sue at law or in equity in any court of competent jurisdiction.

* * *

(c) No action shall be maintained to enforce any liability created under this section unless brought within one year after the discovery of the facts constituting the cause of action and within three years after such cause of action accrued."

[11] "Person" includes "two or more persons act[ing] as a . . . group for the purpose of acquiring, holding, or disposing of securities. . . ." Section 13(d)(3).

[12] *Myers* v. *American Leisure Time Enterprises, Inc.*, 402 F. Supp. 213 (S.D.N.Y. 1975), *aff'd without opinion*, 538 F.2d 312 (2d Cir. 1976); *In re Penn Central Securities Litigation*, 494 F.2d 528 (3d Cir. 1974). Cf., *GAF* v. *Milstein*, 453 F.2d 709 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972) (action seeking only injunctive relief).

Such an action, however, may be brought under Section 18, which permits certain individuals to maintain a damages action against any person who has made a false or misleading filing under, *inter alia,* Section 13(d).

Plaintiff, however, has not met the pleading requirements of Section 18. Essential elements of a sufficient claim for relief under that section are allegations that the plaintiff actually read and relied on defendants' fraudulent 13D schedules; that those schedules affected the sale price of his stock; and that he has commenced the action within one year after discovery of the fraud, in compliance with Section 18's statute of limitations.[13] Plaintiff has failed to allege any of these essential facts, and his claims under Section 13 and Regulation 13D must be dismissed.

Motions for § 1292(b) Certification

Defendants' certification motions are now moot insofar as they seek review of our January 6 order's denial of the motion to dismiss plaintiff's Section 13 and Regulation 13D claims. The motions require further discussion, however, to the extent that they seek certification of the remainder of the order.

Defendants assert that two aspects of the January 6 order merit interlocutory review: (1) our conclusion that the forced seller doctrine has survived *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975), and (2) our alleged abandonment of the "in connection with" requirement of Section 10(b) and Rule 10b-5.[14]

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[13] *Gross* v. *Diversified Mortgage Investors*, 438 F. Supp. 190 (S.D.N.Y. 1977); *Rich* v. *Touche Ross & Co.*, 415 F. Supp. 95 (S.D.N.Y. 1976).

[14] Webster Securities Limited also renews defendants' attack on the sufficiency of plaintiff's allegations of damages. Plaintiff has

Appendix L

It was established in *Vine* v. *Beneficial Finance Co., supra,* and *Crane Co.* v. *Westinghouse Air Brake Co., supra,* that a stockholder has standing to maintain a Section 10(b) action if the defendant's fraud or illegal manipulation indirectly compels the divestiture of his stock. We concluded in our January 6 opinion that those cases remain viable interpretations of the purchaser/seller requirement of Section 10(b) announced in *Birnbaum* v. *Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952), and adopted in *Blue Chip Stamps* v. *Manor Drug Stores, supra.*

Defendants argue that this conclusion conflicts with recent Supreme Court decisions strictly interpreting the federal securities laws. Those decisions, however, do not dictate the restrictive interpretation of Section 10(b) urged by defendants. *Blue Chip Stamps* left open the boundaries of the purchaser/seller requirement but indicated possible approval of a flexible construction of the requirement.[15] Indeed, the Court has said that Section 10(b) " 'must be read flexibly, not technically and restrictively.' " [16] And although a private cause of action under the securities laws should not be implied "where it is 'unnecessary to ensure the fulfillment of Congress' pur-

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alleged that defendants reaped wrongful profits of some $2¼ million. These wrongful profits are recoverable in a Rule 10b-5 action upon proper proof. *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 155 (1972). See *Gould* v. *American-Hawaiian S.S. Co.*, 535 F.2d 761 (3d Cir. 1976); *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1304-05 (2d Cir. 1973).

[15] *Blue Chip Stamps* v. *Manor Drug Stores, supra,* 421 U.S. at 751.

[16] *Santa Fe Industries, Inc.* v. *Green,* 430 U.S. 462, 475-76 (1977), quoting *Superintendent of Insurance* v. *Bankers Life & Cas. Co.*, 404 U.S. 6, 12-13 (1971).

poses,'" [17] Section 10(b) was intended to protect purchasers and sellers of securities[18] by ensuring "full disclosure" of relevant information.[19]

Lower court decisions similarly provide no direct support for defendants' argument. The Second Circuit has refused to adopt a restrictive reading of the purchase/sale requirement of *Blue Chip Stamps*[20] or of Section 10(b) in general.[21] Moreover, the only other court to consider the question has approved the forced seller doctrine in light of *Blue Chip Stamps.*[22] These decisions and defendants' inability to cite authority directly supporting their interpretation of Section 10(b)[23] convince us that there is not

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[17] *Santa Fe Industries, Inc.* v. *Green, supra,* 430 U.S. at 477, quoting *Piper* v. *Chris-Craft Industries, Inc.,* 430 U.S. 1, 41 (1977).

[18] *Blue Chip Stamps* v. *Manor Drug Stores, supra,* 421 U.S. at 733-736.

[19] *Santa Fe Industries, Inc.* v. *Green, supra,* 430 U.S. at 477.

[20] See *Mallis* v. *F.D.I.C.,* 1976-77 Fed. Sec. L. Rep. (CCH) ¶ 95,823 (2d Cir.), *cert. granted sub nom. Bankers Trust Co.* v. *Mallis,* 431 U.S. 928 (1977); *Arthur Lipper Corp.* v. *S.E.C.,* 547 F.2d 171 (2d Cir. 1976), *cert. denied,* 46 U.S.L.W. 3436 (U.S. Jan. 10, 1978). See also *United States* v. *Brown,* 555 F.2d 336 (2d Cir. 1977).

[21] See *Rolf* v. *Blyth, Eastman Dillon & Co.,* Current Fed. Sec. L. Rep. (CCH) ¶ 96,275 (2d Cir. 1978). See also *Gross* v. *Diversified Mortgage Investors,* 431 F. Supp. 1080, 1093 (S.D.N.Y. 1977).

[22] *Houlihan* v. *Anderson-Stokes, Inc.,* 434 F. Supp. 1330 (D.D.C. 1977).

[23] The two Southern District of New York cases cited by defendants on this point are inapposite. *Bio-Medical Sciences, Inc.* v. *Weinstein,* 407 F. Supp. 970 (S.D.N.Y. 19776), did not involve a forced sale of stock. Judge Ward's denial of standing to the plaintiff in *Crane Co.* v. *American Standard, Inc.,* 439 F. Supp. 945 (S.D.N.Y. 1977), was based on his conclusion that the expressly limited holding of *Piper* v. *Chris-Craft Industries, Inc., supra,* 430 U.S. at 42, n.28, precluded the maintenance of a Rule 10b-5 action

"substantial ground for difference of opinion," 28 U.S.C. § 1292(b), concerning our adherence to the forced seller doctrine.

We also reject defendants' argument that our opinion abandons the "in connection with" requirement of Section 10(b) and Rule 10b-5. That argument rests on the premise that the Westates redemption could not have been accomplished without board and shareholder approval and the negotiation of a purchase agreement. Fraud may be "in connection with" a forced sale of securities, however, even though the two are separated by intermediate steps.[24] The connection requirement is satisfied if the fraud "touches" the sale.[25] Plaintiff here has alleged that defendants' fraud was in furtherance of their conspiracy to effect Westates' dissolution and wrongfully to profit from the resulting stock redemption. The fraud thus may be "intrinsic to the securities transaction itself."[26] Defendants, therefore,

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by a "defeated contestant in a takeover battle." *Crane Co.* v. *American Standard, Inc., supra,* 439 F. Supp. at 953. Plaintiff, here, however, is a shareholder who might be able to prove himself a "hoodwinked investor" with standing under Section 10(b). *Piper* v. *Chris-Craft Industries, Inc., supra,* 430 U.S. at 45. Moreover, Westates' stock redemption is an "objectively demonstrable fact," *Blue Chip Stamps* v. *Manor Drug Stores, supra,* 421 U.S. at 747, that allows plaintiff to avoid the proof of causation problems faced by Crane Co. See *Crane Co.* v. *American Standard, Inc., supra,* 439 F. Supp. at 955.

[24] *Crane Co.* v. *Westinghouse Air Brake Co.,* 419 F.2d 787, 795-798 (2d Cir. 1969), *cert. denied,* 400 U.S. 822 (1970); *Vine* v. *Beneficial Finance Co.,* 374 F.2d 627, 635 (2d Cir.), *cert. denied,* 389 U.S. 970 (1967).

[25] *Superintendent of Insurance* v. *Bankers Life & Cas. Co., supra,* 404 U.S. at 12-13.

[26] *Rich* v. *Touche Ross & Co., supra,* 415 F. Supp. at 100. See also *Drachman* v. *Harvey,* 453 F.2d 722 (2d Cir. 1972) (en banc); *Houlihan* v. *Anderson-Stokes, Inc., supra.* Cf. *Ketchum* v. *Green,*

have not shown that there is "substantial ground for difference of opinion" concerning our conclusion that the alleged fraud may be proved to be "in connection with" the Westates redemption.

Accordingly, defendants' motions for certification pursuant to 28 U.S.C. § 1292(b) are denied. Defendants' motions for reargument of their motion to dismiss the complaint are granted. Upon reargument, we grant the motion to dismiss plaintiff's Section 13 and Regulation 13D claims pursuant to Rule 12(b)(6), Fed.R.Civ.P., but otherwise adhere to our opinion and order dated January 6, 1978. Plaintiff is granted leave to file and serve within twenty (20) days an amended complaint alleging a claim under Section 18,[27] if plaintiff is so advised.

So ordered.

Dated: New York, N. Y.
March 22, 1978

/s/ LLOYD F. MACMAHON
Lloyd F. MacMahon
United States District Judge

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557 F.2d 1022 (3d Cir.), *cert. denied,* 46 U.S.L.W. 3306 (U.S. Nov. 8, 1977) (fraud was in connection with internal management dispute rather than securities transaction).

[27] We doubt that plaintiff can meet Section 18's requirements. He stated in his deposition that he had not read the disputed Schedules 13D. Moreover, his assertion that defendants' wrongful profits would have gone to the Westates shareholders absent defendants' fraud does not satisfy Section 18's requirement that defendants' fraud have affected the sale *price* of plaintiff's stock. See *Rich* v. *Touche Ross & Co., supra,* 415 F. Supp. at 102-104. Leave to amend is granted, however, because we cannot conclude as a matter of law that plaintiff is unable to allege a valid Section 18 claim.

Appendix M

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 2110 (LFM)

SAMUEL WEISMAN, on behalf of himself and all others similarly situated,

Plaintiff,

—against—

GEORGE J. DARNEILLE, F. ARNOLD DAUM, ALEX W. HEAD, JOHN. P. OHL, I. L. VOSKO, BEAUMONT DEVELOPMENT CORPORATION and WEBSTER SECURITIES LIMITED,

Defendants.

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Appendix M

MacMahon, *District Judge.*

Defendants move to dismiss this action for lack of subject matter jurisdiction, Rule 12(b)(1), Fed.R.Civ.P., and for failure to state a claim upon which relief can be granted, Rule 12(b)(6), Fed.R.Civ.P.

Construing the complaint favorably to plaintiff,[1] we accept as true the following allegations:[2]

Samuel Weisman owned 100 shares of Westates Petroleum Company ("Westates") from sometime prior to August 9, 1974, continuously to the company's liquidation. Defendants (certain officers and directors of Westates and other individuals) had learned that Westates' stock was substantially undervalued in the open market and that it would bring a higher price upon the company's liquidation. They also had learned, through the use of inside and non-public information, that Westates might seek liquidation.

Pursuant to a conspiracy to influence the company to sell its assets and dissolve, defendants purchased Westates stock in the open market at an average price of $3.24 per share from August 9, 1974 through January 1, 1975. Seven weeks after these purchases had been made, Westates publicly invited offers to purchase its assets. With the approval of the stockholders, a sale of substantially all of the company's assets was consummated on January 21, 1977. As a concomitant of the sale, Westates would redeem all of its stock for approximately $10.70 to $11.10 per share. Defendants would thus net a wrongful profit of $2,251,735.00 as a result of the differential between the

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[1] *Scheur* v. *Rhodes,* 416 U.S. 232 (1974).

[2] *Murray* v. *City of Milford,* 380 F.2d 468 (2d Cir. 1967); *Shapiro* v. *Merrill Lynch, Pierce, Fenner & Smith Inc.,* 353 F. Supp. 264 (S.D.N.Y. 1972).

market and redemption values of their August 9, 1974 through January 1, 1975 stock purchases.

Plaintiff brought this direct action on behalf of himself and all other Westates shareholders (excluding defendants) entitled to share in the proceeds of the company's liquidation.[3] The complaint seeks damages for alleged violations of Sections 10(b)[4] and 13[5] of the Securities Exchange Act of 1934 and of Rule 10b-5[6] and Regulation 13D[7] promulgated thereunder. Plaintiff also asserts claims for breach of fiduciary duty by the Westates directors and officers and for fraud.

Defendants' challenge to our subject matter jurisdiction is unpersuasive. Plaintiff alleges violations of the federal securities laws, and the allegations are not "insubstantial, implausible . . . or otherwise devoid of merit." [8] We therefore have jurisdiction to determine whether those allegations state a claim upon which relief can be granted.[9] Moreover, the federal and state law claims are so closely related to a "common nucleus of operative fact" that plaintiff "would ordinarily be expected to try them all in one judicial proceeding." [10] We may therefore exercise our pendent

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[3] The suit has not been certified as a class action. See Rule 23(c), Fed.R.Civ.P.

[4] 15 U.S.C. § 78j(b).

[5] 15 U.S.C. § 78m.

[6] 17 C.F.R. § 240.10b-5.

[7] 17 C.F.R. §§ 240.13d-1—240.13d-4.

[8] *Hagans* v. *Lavine,* 415 U.S. 528, 543 (1974).

[9] *Levin* v. *Great Western Sugar Co.,* 406 F.2d 1112 (3d Cir. 1969); *Rosen* v. *Albern Color Research, Inc.,* 218 F. Supp. 473 (E.D. Pa. 1963). See *Romero* v. *International Terminal Operating Co.,* 358 U.S. 354, 359 (1959).

[10] *United Mine Workers* v. *Gibbs,* 383 U.S. 715, 725 (1966).

jurisdiction over plaintiff's common law fraud and fiduciary claims.

Reaching this conclusion, we address defendants' Rule 12(b)(6) motion. We reject the motion outright insofar as it attacks the complaint's allegations of damages, causation and scienter. The allegations of each are sufficient to allow proof of facts entitling plaintiff to relief.[11] Defendants' attacks on plaintiff's standing, however, are substantial and merit discussion.

Defendants argue that plaintiff did not sell or purchase Westates stock "in connection with" their alleged deception, and that he consequently lacks standing to bring a damages action under Section 10(b) or Rule 10b-5,[12] or under Section 13(d) or Regulation 13D.[13] Plaintiff admits that he owned his Westates stock "prior to August 9, 1974 continuously to the date of dissolution and liquidation of Westates," [14] but advances numerous arguments in support of his standing. We conclude that plaintiff may be able to prove himself a "forced seller" within the meaning of *Vine* v. *Beneficial Finance Co.*, 374 F.2d 627 (2d Cir.), *cert. denied*, 389 U.S. 970 (1967), and *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787 (2d Cir. 1969), *cert. denied*, 400 U.S. 822 (1970), and therefore do not discuss his other contentions.

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[11] See *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957).

[12] *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975).

[13] *Myers* v. *American Leisure Time Enterprise, Inc.*, 402 F. Supp. 213 (S.D.N.Y. 1975), *aff'd without opinion*, 538 F.2d 312 (2d Cir. 1976); *In re Penn Central Securities Litigation*, 494 F.2d 528 (3d Cir. 1974). Cf., *GAF* v. *Milstein*, 453 F.2d 709 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972) (purchaser/seller status not required in an action seeking only injunctive relief).

[14] Complaint ¶ 8.

Appendix M

Defendants argue that *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975), has vitiated the holdings of *Vine* and *Crane*. *Vine* and *Crane* established that stockholders forced to sell their shares as an indirect result of the defendant's fraud or illegal manipulation have standing to maintain a Section 10(b) action. Those forced seller cases accordingly define, rather than reject, the purchaser/seller requirement announced in *Birnbaum* v. *Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952), and adopted in *Blue Chip Stamps*.[15] Indeed, language in *Blue Chips Stamps* suggests approval of the forced seller doctrine.[16] *Vine* and *Crane* thus remain viable interpretations of the purchaser/seller requirement.[17]

Defendants attempt to distinguish the forced seller cases from the present action by arguing that their ownership of only 6% of Westates stock at the time of the sale demonstrates that they could not have compelled the sale and stock exchange.[18] Plaintiff, however, may be able to show that defendants' control of other stock made approval of the merger a certainty or that defendants' fraud precluded plaintiff's ability effectively to oppose the sale. A showing of either would be sufficient to establish plaintiff's

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[15] See Judge Hufstedler's dissent in *Manor Drug Stores* v. *Blue Chip Stamps*, 492 F.2d 136, 144-45 n.4 (9th Cir. 1973).

[16] See *Blue Chip Stamps* v. *Manor Drug Stores, supra*, 421 U.S. at 733.

[17] See Note, Standing Under Rule 10b-5 After Blue Chip Stamps, 75 Michigan L. Rev. 413 (1976).

[18] We note that the *Crane* defendant owned approximately 10% of the stock there. *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787, 792-93 (2d Cir. 1969), *cert. denied*, 400 U.S. 822 (1970).

standing to maintain his Section 10(b) or Rule 10b-5 claims.[19]

Plaintiff also may be able to prove facts sufficient to support his standing under Section 13(d) and Regulation 13D. Section 13(d) implies no private cause of action for damages.[20] Plaintiff must therefore meet the purchaser/seller requirement of Section 18.[21] Our research has disclosed no decision applying the forced seller doctrine to a Section 18 damages action. However, the intent of Congress to afford broad disclosure of material information to investors through Section 13(d) filings[22] is best served by applying to Section 18 the broad definition of "sale" and "purchase" applicable to a Section 10(b) action.

Stockholders forced to sell their holdings pursuant to a corporate merger obtained through the filing of a fraudulent Schedule 13D suffer harm within the contemplation of Section 18. Such stockholders should have standing to invoke the protection of that section. Plaintiff may be able to prove that stockholder approval of the Westates sale was obtained by defendants' deception, and that the deception affected the price of the stock. Such proof, coupled with the forced sale of his stock, will be sufficient to give him standing to maintain his Section 13(d) and Regulation 13D claims. The possibility of plaintiff's proving himself a "forced seller," thus, precludes our dismiss-

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[19] See *Vine* v. *Beneficial Finance Co.*, 374 F.2d 627, 635 (2d Cir.), *cert. denied*, 389 U.S. 970 (1967), and *Crane Co.* v. *Westinghouse Air Brake Co., supra*, 419 F.2d at 795-98.

[20] *Myers* v. *American Leisure Time Enterprise, Inc., supra.*

[21] 15 U.S.C. § 78r.

[22] See, *e.g.*, H.R. Rep. No. 1711, 90th Cong., 2d Sess., reprinted in 1968 U.S. Code Cong. & Admin. News 2811-2819.

ing any of his federal securities laws claims for lack of standing.

Accordingly, defendants' motion under Rules 12(b)(1) and 12(b)(6), Fed.R.Civ.P., is denied.

So ordered.

Dated: New York, N. Y.
January 6, 1978

/s/ LLOYD F. MACMAHON
Lloyd F. MacMahon
United States District Judge

Supreme Court, U. S.
FILED
JUN 25 1980
MICHAEL RODAK, JR., CLERK

79-1736

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 1736

GEORGE J. DARNEILLE *et al.*,

Petitioners,

v.

MICHAEL CARO,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

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June 23, 1980

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IN THE

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GEORGE J. DARNEILLE et al.,

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v.

MICHAEL CARO,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

Statement

Petitioners herein (hereinafter "defendants") seek a writ of certiorari to review an interlocutory order of the United States Court of Appeals for the Second Circuit dated January 9, 1980 (1a*) holding that the District Court,

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* References to "a" are to the Appendix to the petition for certiorari.

had violated the mandate of the Court of Appeals (4a) as embodied in the Court of Appeals prior interlocutory orders of January 17, 1979 (14a) and March 7, 1979 (16a)in denying respondent's motion for intervention in this federal securities class action, . Defendants seek to review the correctness of the Court of Appeals' orders of January 17, 1979 and March 7, 1979, though the time in which to file a petition for certiorari to review those orders has long since expired.

This action is brought as a class action upon behalf of all persons who owned the common stock of Westates Petroleum Corporation ("Westates") on February 1, 1977, the record date for determining the shareholders of Westates who were entitled to share in the proceeds of the liquidation of Westates. The common stock of Westates had been listed and traded on the American Stock Exchange. The complaint alleges violations of Sections 10(b) and 13(d) of the Securities Exchange Act of 1934 and Regulations 10b-5 and 13 thereunder, as well as a pendent claim for common law breach of fiduciary duty.

In essence, the complaint alleges a scheme by the defendants (officers and directors of Westates and tippees acting in concert with them) to purchase the common stock of Westates upon the open market with the inside information that Westates would be liquidated at a much higher price per share of common stock. A mere seven

weeks after defendants had completed purchasing 293,000 shares of Westates stock at an average price of $3.24 per share, Westates publicly invited offers to buy substantially all of its assets and thereafter Westates liquidated at between $10.70 and $11.10 per share. The profits realized by the defendants through this fraudulent scheme were at least $2,251,735.

The complaint seeks, in effect, disgorgement by defendants of their illegal profits to the thousands of other persons who, exclusive of defendants, owned Westates common stock as of the record date for sharing in the proceeds of Westates' liquidation. Since all such stockholders of Westates are similarly situated and since all question of law and fact are common to them, this is a paradigmatic class action.

In an opinion dated January 6, 1978 (48a), the District Court found that the complaint stated a cause of action under Sections 10(b) and 13(d) of the 1934 Act and denied the motion to dismiss the complaint. Respecting Section 10b, the District Court determined that plaintiff and the other members of the class were "forced sellers".

Thereafter, certain of the defendants moved for reargument or, alternatively, for certification, pursuant to 28 U.S.C. §1292(b), of the order denying the motion to dismiss. In an opinion dated March 22, 1978 (37a), the District Court denied certification

or reargument, except that the District Court dismissed the Section 13(d) claim.

However, the motion of plaintiff, Samuel Weisman, for class certification was denied by the District Court by opinion dated April 19, 1978 (32a) upon the ground that plaintiff was an inadequate class representative. Defendants thereafter tendered plaintiff Weisman his individual damages of $271.40 (inclusive of costs) which tender **was not accepted** by plaintiff. Instead, plaintiff continued to litigate the action and sought to commence discovery by moving for the production of documents (23a-24a, 30a-31a). Defendants then moved to dismiss the action as moot. By opinion dated July 14, 1978 (19a), the District Court held that the action and also plaintiff's motion for production of documents were moot and judgment dismissing the action as moot was entered on July 27, 1978 (18a).

Plaintiff Weisman then appealed to the Court of Appeals and briefs were filed and oral argument duly had. The question whether defendants could, after denial of class certification, moot this action by tendering Weisman his individual damages of $271.40 (inclusive of costs) was fully briefed and argued before the Court of Appeals upon plaintiff Weisman's appeal (Docket No. 78-7422) from the judgment of the District Court dismissing this action as moot.

In addition to arguing that defendants could not moot this class action by tendering plaintiff Weisman his individual damages, plaintiff further argued in his briefs that the decision of the District Court denying class certification upon the ground that plaintiff was an inadequate class representative was erroneous and that, in any event, provision should be made for protection of the class by notice to the class members (pl's brief, pp. 52-54; pl's reply brief, pp. 25-27). In this connection, plaintiff emphasized that defendants' answers in this action pleaded the defense of the statute of limitations (pl's reply brief, pp. 8-9, 26). Defendants' brief (pp. 41-44) opposed the giving of any notice to the members of the class.

Subsequent to oral argument, plaintiff Weisman, aged 77, requested that the appeal be dismissed because of the critical illness of himself and his wife.* By order dated January 17, 1979 (14a) which was subsequently filed in the District Court as the mandate, the Court of Appeals dismissed the appeal, with, however, the express proviso that the "order [of dismissal] shall not prejudice the right of another plaintiff to enter the suit within 30 days." The Court of Appeals' order of January 17, 1979 reads as follows:

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*The letter of plaintiff's counsel to the Court of Appeals (which enclosed letters from plaintiff and plaintiff's son) are set forth at pp. 57-59 of the Joint Appendix in the Court of Appeals.

> "Appeal from the United States District Court for the Southern District of New York.
>
> This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.
>
> ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that, because the appellant, who has been found by the District Court to be an inadequate class representative, has indicated that he no longer wishes to be a plaintiff in this lawsuit, the appeal be dismissed. This order shall not prejudice the right of another plaintiff to enter the suit within 30 days" (emphasis supplied).

On February 2, 1979 respondent, Michael Caro, a member of the class, moved to intervene in this action pursuant to the leave specifically granted in the Court of Appeals order of January 17, 1979 (3a). Certain defendants then moved in the Court of Appeals on February 15, 1979 (3a, 16a) for "modification of panel order" upon the ground that, upon the withdrawal of Weisman, the sole plaintiff-appellant, no case or controversy existed which would support intervention and that accordingly the Court of Appeals order of January 17, 1979 should be modified

to provide that the order was without prejudice to the right of another plaintiff to file suit based upon the same facts.

By letter dated February 20, 1979, plaintiff's counsel advised the Court of Appeals that it was not filing an answer to defendants' motion for "modification" because it was in reality an untimely petition for rehearing. Defendants then moved the Court of Appeals by motion dated February 21, 1979 to have its motion for "modification" be "deemed to be a timely motion for reconsideration, should the Court deem that to be appropriate". By order dated March 7, 1979, the Court of Appeals granted defendants' motion to have its motion for "modification" be deemed to be a timely motion for reconsideration. By separate order also dated March 7, 1979 (16a), the Court of Appeals denied defendants' motion to modify its order of January 17, 1979 permitting intervention by another member of the class within 30 days, stating as follows:

> "It is hereby ordered that the motion made herein by counsel for the appellees Darneille and Daum by notice of motion dated February 15, 1979 to modify the Court's decision of January 16, 1979 be and it hereby is denied. Because class certification has been denied, 'it does not...follow that the case must be treated as if

there never was an action brought on behalf of absent class members.' United Airlines, Inc. v. McDonald, 432 U.S. 385, 393 (1977), quoting Philadelphia Electric Co. v. Anaconda American Brass Co., 43 F.R.D. 452, 461 (E.D. Pa. 1968)."

Notwithstanding the Court of Appeals express decisions (set forth in its orders of January 17, 1979 and March 7, 1979) specifically rejecting defendants' contentions that no case or controvery existed because of plaintiff Weisman's withdrawal of his appeal and specifically permitting intervention by another member of the class, the District Court denied the motion by respondent, Michael Caro, a member of the class, for intervention upon the ground that there is "no action pending". The memo endorsement of the District Court, dated March 14, 1979 (9a), denying intervention reads as follows:

"The motion of Michael Caro to intervene in this action as a party plaintiff is denied without prejudice to his right to commence a new action based on the acts alleged in this action. Our dismissal of Weisman's action has not been appealed, and there is, therefore, no action pending in which Caro can intervene. Tilley Lamp Co. v. Thacker, 454 F.2d 805 (5th Cir. 1972). Additionally, Caro does not

> seek to intervene to appeal the denial of Weisman's motion for class certification, and, thus, the Supreme Court's decision in United Air Lines, Inc. v. McDonald, 432 U.S., 385 (1977), is not applicable.
>
> So ordered."

By petition dated April 10, 1979, respondent Caro filed in the Court of Appeals an application for a writ of mandamus to compel obedience to the mandate of the Court permitting timely intervention in this class action by another member of the class. Caro also filed a notice of appeal from the order of the District Court denying intervention out of an abundance of caution as a safeguard against the contingency that the petition for mandamus might fail. Defendants opposed appellant's petition for mandamus upon the ground, inter alia, that mandamus will not issue where an appeal lies. By order dated June 8, 1979, the Court denied appellant Caro's petition for mandamus and granted Caro's motion to reinstate this appeal which had been dismissed for failure to perfect it.

After oral argument was duly had upon respondent Caro's appeal from the order of the District Court denying his motion for intervention, the Court of Appeals, by order dated January 9, 1980 (1a), reversed the District Court's order of denial and remanded the matter to the District Court with instructions to consider the application of Caro for

intervention in accordance with the provisions of Rule 24 of the Federal Rules of Civil Procedure. The express ground for the Court of Appeals reversal of the District Court was that "the district court has failed to comply with the mandate of this Court", as embodied in the Court of Appeals prior orders of January 17, 1979 (dismissing plaintiff Weisman's appeal without prejudice to the right of another plaintiff to enter the suit within thirty days) and of March 7, 1979 (denying defendants' motion for modification of such order of January 17, 1979). Finally, by order dated February 27, 1980 (6a, 8a), the Court of Appeals denied defendants' petition for rehearing and rehearing in banc.

Reasons for Denying the Writ

I

The Time In Which To File A Petition For Certiorari To Review The Correctness Of The Court Of Appeals Prior Orders Of January 17, 1979 And March 7, 1979 (Holding That The Voluntary Dismissal Of The Original Plaintiff's Appeal Would Be Without Prejudice To The Right Of Another Plaintiff To Enter The Suit Within Thirty Days) Has Expired.

It is clear beyond cavil that, in denying respondent Caro's motion for intervention upon the ground that there is "no action pending" (9a), the District Court had not followed the mandate of the Court of Appeals as

embodied in the Court of Appeals' orders of January 17, 1979 and March 7, 1979. The Court of Appeals prior order of January 17, 1979 specifically stated that the "order [of dismissal] shall not prejudice the right of another plaintiff to enter the suit within 30 days" (15a); and in its order of March 7, 1979 denying defendants motion for reargument, the Court of Appeals further specifically stated that, because class certification has been denied, it does not follow that the case must be treated as if there never was an action brought on behalf of absent class members (16a-17a).

These orders of the Court of Appeals clearly ruled that this action is sufficiently alive to permit timely intervention by another member of the class and the District Court in effect purported to overrule these orders by denying a timely motion for intervention upon the ground there is "no action pending". The District Court was obliged to obey the mandate of the Court of Appeals whether it was right or wrong.

The Court of Appeals' order dated January 9, 1980 did not decide to permit intervention by another member of the class. That decision had already been made in the Court of Appeals prior orders of January 17, 1979 and March 7, 1979 (which defendants did not seek a writ of certiorari to review).

Instead, the order of January 9, 1980 explicitly reversed the District Court for failure to comply with the

Court of Appeals' mandate. "Because the district court has failed to comply with the mandate of this Court, we reverse." (4a) The remainder of the Court of Appeals order of January 9, 1980 (4a-5a) merely explains the rationale of its prior orders of January 17, 1979 and March 7, 1979 permitting intervention.

The only person with standing to appeal the District Court's order denying class certification upon the ground that plaintiff Weisman was, for reasons personal to Weisman, an inadequate class representative was Weisman himself. For this reason, the Court of Appeals prior orders of January 17, 1979 and March 7, 1979 did not permit intervention for the purpose of prosecuting plaintiff Weisman's appeal but instead dismissed the appeal without prejudice to the right of another plaintiff to enter the suit within thirty days.

Since the order of January 9, 1980, holding that the District Court had violated the Court of Appeals' mandate is manifestly correct and since the time in which petition for certiorari to review the prior orders of January 17, 1979 and March 7, 1979 has long since expired, no basis whatsoever exists for the issuance of a writ of certiorari by this Court. When and if a final judgment adverse to defendants is entered in the District Court and is affirmed by the Court of Appeals, defendants may, if they are then so advised, challenge the correctness of the Court of Appeals prior

interlocutory orders of January 17, 1979 and March 7, 1979 (permitting intervention by another member of the class) upon petition for certiorari to this Court for review of such final judgment. Hanover Shoe, Inc. v. United States Shoe Machinery Co., 392 U.S. 481, 488, n.6 (1968); Mercer v. Theriot, 377 U.S. 152, 153-154 (1964); Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 418 (1923); Hamilton-Brown Shoe Co. v. Wolf Brothers, 240 U.S. 251, 257-258 (1916).

II

In The Particular Circumstances, It Was An Entirely Proper Exercise Of Discretion For The Court Of Appeals To Permit Intervention By Another Member Of The Class. In Any Event, Such Particular Exercise Of Discretion In A Unique And Non-Recurring Factual Situation Does Not Warrant Review By This Court

The Court of Appeals orders of January 17, 1979 and March 7, 1979, permitting intervention by another member of the class, represents, in the particular circumstances in which they were entered, an entirely proper exercise of discretion.

The prior orders of January 17, 1979 and March 7, 1979 correctly anticipated this Court's subsequent decision in Deposit Guaranty National Bank v. Roper, 100 S.Ct. 1166 (1980), holding that defendants could not moot a class action, after denial of class certification by the District Court, by tendering the named class

representative (Weisman) his individual damages where, as here, the named class representative refused to accept such tender of individual damages. Instead, plaintiff Weisman continued to litigate this action, making, for example, a motion for production of documents and arguing strenuously that a dismissal for mootness would undermine the policies behind Rule 23 Fed. R. Civ. P. (23a-24a); and when the District Court dismissed the action for mootness, Weisman appealed such dismissal to the Court of Appeals.

However, after oral argument, Weisman, aged 77, requested that the appeal be dismissed because of the critical illness of himself and his wife. At that point, the Court of Appeals was confronted with the question of what, if anything, should be done to protect the interests of absent class members, particularly in view of the statute of limitations problems involved (4a). The action was not mooted by defendants' tender of individual damages because, as stated, plaintiff Weisman had not, and has never, accepted such tender. Plaintiff Weisman desired to discontinue as the representative of the class because of the critical illness of himself and his wife. Plaintiff Weisman's desire to discontinue was thus completely unrelated to defendants' tender of individual damages and therefore this action is controlled by this Court's decision in Deposit Guaranty National Bank v. Roper, supra.

In these circumstances, it was not an abuse of discretion for the Court of Appeals to condition the voluntary dismissal of the appeal with the proviso that the dismissal would be without prejudice to the right of another plaintiff to enter the suit within thirty days. Rule 42(b) of the Federal Rules of Appellate Procedure specifically provides that the Court may fix terms or conditions for voluntary dismissal by an appellant. See, in this connection, the decisions cited by the Court of Appeals in its order of Janaury 9, 1980, namely, United Airlines, Inc. v. McDonald, 432 U.S. 385, 392 (1977) (permitting intervention by another class member where, after denial of class certification, the named class representatives settled their individual claims, after which a judgment of dismissal was entered); Shelton v. Pargo, Inc., 582 F.2d 1298, 1304-16 (4th Cir. 1978) (district court may, in its discretion, require notice to absent putative class members if it determines proposed settlement of individual claims of named class representatives prior to class certification is collusive or prejudicial); Rothman v. Gould, 52 F.R.D. 494 (S.D.N.Y. 1971) (notice required to be given to absent members of putative class where named class representative settled his individual claim before class certification); Philadelphia Electric Co. v. Anaconda American Brass Co., 43 F.R.D. 452, 460-61 (E.D. Pa. 1968) (because class certification has been denied "it does . . . not follow that the case must

be treated as if there never was an action brought on behalf of absent class members"). See, additionally, Note, "Developments - Class Actions", 89 Harvard Law Review 1318, 1546 (1976) ("where dismissal is based on a problem of inadequacy of representation which a different plaintiff might be able to correct, notice should normally be ordered to protect possible reliance.") (emphasis supplied).

Here, the Court of Appeals did not require, or even permit, notice to absent class members. Instead, the Court of Appeals took the more modest step of merely permitting timely intervention by another class member. Such exercise of discretion, in the particular circumstances, certainly was not arbitrary or capricious. In any event, such an exercise of discretion in a unique and non-recurring factual situation plainly does not warrant review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

Dated: June 23, 1980

Respectfully submitted,

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Dated: June 23, 1980

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